

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
APPENDIX**

77-11261

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-8165

UNITED STATES OF AMERICA,

Appellee,

-against-

RAYMOND DAVID WEAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S SUPPLEMENTAL APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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MP/tk
laml

1 THE COURT: I regret the delay.

2 MR. WEISSWASSER: Your Honor, there is one item
3 I would like to clear up before the jury comes in.

4 Your Honor will recall the Government called
5 Agent Morell yesterday, admittedly for a limited
6 purpose.

7 Prior thereto, the Government in 3500 material
8 had given us several pages of Mr. Morell's testimony.

9 Mr. Marks advises me he gave me that in error,
10 but we had it in our file. In reading through
11 Mr. Morell's testimony I noticed that the testimony
12 which I was given was partial, in fact, it starts out
13 on the page, if your Honor has the 3500 material, it
14 is 3500-2, on page 25, where his testimony says,
15 "Both the agents having been recalled previously sworn
16 resumed as follows."

17 Obviously there was testimony prior to that.

18 I had a conversation with Mr. Marks this morning
19 where I asked for the balance of the testimony.
20 Mr. Marks said it did not relate to what he said on
21 the stand.

22 The Government is not in a position to pre-judge
23 what is relevant and what is not. Once a witness is
24 called we are entitled to have his entire testimony if
25 it relates to this case. It is up to us to determine

1 is relevant and pertinent. As to whether it pertains
2 to his testimony or not has nothing whatever to do with
3 the Government's prejudgment. We are entitled to it
4 fully and completely. There may be other areas we
5 wish to question on.

6 We asked no question of Mr. Morell because
7 having read the testimony which was furnished there was
8 no reason to cross-examine. I don't know what might
9 be contained in the other grand jury testimony.

10 I don't think the Government is in a position
11 to judge whether we are entitled to have it or not. I
12 think it is proper 3500 material and I am asking for
13 the Court to direct that the balance of the agent's
14 testimony be turned over.

15 THE COURT: Mr. Marks, I am sure you have a
16 response.

17 MR. MARKS: Yes. I asked Agent Morell if he
18 was an FBI agent. I asked him if he knew who had
19 taken a photograph which was marked in evidence. He
20 said, yes, he took it. That was the sum and substance
21 of his testimony. He testified in the grand jury,
22 wrote reports about this case, not about having taken
23 the photographs.

24 In 3500, a statement or report requested must
25 relate to the subject matter of the witness' direct

1 testimony before it will be turned over to the
2 defendant.

3 THE COURT: Yes, but I think there is a very
4 narrow construction of subject matter. It doesn't
5 say to the testimony, it says the subject matter.

6 In my opinion, the subject matter is his
7 participation in the subject of this case. So I think
8 Counsel is correct in that view of it. I would direct
9 the Government to make available whatever the material
10 is if it pertains to this case.

11 MR. MARKS: In that event, in light of your
12 Honor's ruling, Agent Morell will be available for
13 further cross-examination. I am now turning over --
14 May I have this marked? It is a 3500 exhibit.

15 THE CLERK: 3500-5, multi-page document, marked
16 Government's exhibit 3500-5.

17 MR. WEISSWASSER: Mr. Marks, so that we may keep
18 the record straight, I am going to remove from 3500-3
19 which you have already given me, two pages, 25 through
20 27, Mr. Morell's continuing testimony, and I ask that
21 be attached and be part of 3500-5 and delete 3500-3.

22 MR. MARKS: I don't follow that at all. I
23 suggest we continue numbering these in order. 3500-5
24 is a copy of the entire case report. 3500-6, which I
25 am turning over now, are the grand jury minutes.

1 THE COURT: In toto?

2 MR. MARKS: Yes, of Steven Morell, dated
3 5/30/75. I may have more.

4 THE CLERK: So marked 3500-6.

5 MR. MARKS: There is one piece of grand jury
6 testimony which I am looking for now. 3500 --

7 THE CLERK: That is 7.

8 MR. MARKS: The grand jury minutes of Wean
9 and Morell dated 5/30/75.

10 THE CLERK: So marked.

11 That is 3500-7.

12 MR. MARKS: I have now turned over all the case
13 reports and all the grand jury minutes in this matter.

14 MR. WEISSWASSER: Judge, I'm not too sure that
15 is entirely accurate. In 3500-2, which purported to
16 be the case material signed by Agent Colgan, who is
17 now on the stand, the pages are serially numbered --

18 MR. MARKS: 3500-5, you will see, you have the
19 entire case report now. We are ready to proceed, your
20 Honor.

21 Your Honor, I anticipate our case will take no
22 more than about a half hour after conclusion of
23 Agent Colgan. I understand Mr. Weisswasser wants to
24 put on a couple witnesses. There is a real likelihood
25 this case will go to the jury today.

1 MR. WEISSWASSER: I only have one small problem.
2 I would like to have an opportunity to read this
3 material that I have just been handed.

4 Mr. Marks has said I have now a complete file
5 by Mr. Colgan, which I was missing --

6 MR. MARKS: Wrong, wrong -- I have turned over
7 all of Colgan's statements prior to trial. What I
8 have done now is to save the Court's time, save
9 Mr. Weisswasser's time by turning over the entire case
10 report which contains 302's of other agents who will
11 not testify.

12 THE COURT: I see.

13 Can you just look through that quickly?

14 MR. WEISSWASSER: May I have two minutes to
15 glance through it quickly?

16 THE COURT: Yes.

17 MR. MARKS: Your Honor, so your Honor's notes
18 are correct, I asked the Court Reporter to re-read
19 the testimony with respect to when the radio transmission
20 was received, and I think that your Honor will see
21 that there is no testimony to the effect that it was
22 received at 9:20. The only testimony was on cross-
23 examination that it was received between 9:30 and 9:45.

24 One of my first questions on direct, I suppose --

25 MR. WEISSWASSER: May I interrupt, Mr. Marks.

I ask Mr. Colgan be excused.

MR. MARKS: I said all I had to say.

MR. WEISSWASSER: I have something to say on the subject and I ask Mr. Colgan be excused.

THE COURT: All right, Mr. Colgan, just step outside.

(Witness leaves courtroom.)

MR. WEISSWASSER: If your Honor will look, starting on page 24 on direct examination, the bottom of page 25, a question by Mr. Marks:

"And specifically, I direct your attention as to around 9:20 or so in the morning, at that time, were you working?"

And he says, "I was working in Queens, New York."

And then on line 8, the following page, 25:

"Did you have occasion to receive a radio transmission?"

And he says he did. And that he proceeded to Maspeth and Rost. And then on line 23 he is asked:

"At about what time did you arrive at the intersection of Maspeth and Rost?"

And it was approximately 9:45 he arrived there.

I started to figure, somewhere in the direct examination or in the cross, it took him ten or

1 fifteen minutes to get from where he received the
2 transmission to get to the area in question.

3 The pertinent point -- Your Honor knows I asked
4 for the logs -- was at what time the vehicle was
5 allegedly observed at the location in question, which
6 prompted the radio transmission to get him there.
7 Taking the testimony at best, if he arrived in the
8 vicinity at 9:45 and it took him ten minutes, he
9 couldn't have gotten the transmission before 9:35.
10 The vehicle was reported stolen -- I forget when it
11 was reported stolen, I don't think that is of any
12 moment as to how long it took the vehicle -- But five
13 minutes before nine the vehicle disappeared. So at
14 best there is a 40-minute lapse between the time the
15 vehicle is last seen and then it arrives at the
16 location in Maspeth, where allegedly someone sees it
17 and makes a report and there is a transmission to the
18 agent.

19 In my own mind, I would think obviously there
20 was some time from the time someone saw the vehicle
21 and radioed it in and the person received the message
22 and called the FBI and the FBI called the agent who
23 is testifying on the stand. If he received the
24 transmission at 9:35, I would say at best it was 9:30
25 when the vehicle was spotted parked in the location.

10

That is my computation from the testimony.

THE COURT: I don't think my notes are that far off.

MR. WEISSWASSER: Nor do I think are mine.

THE COURT: Is there anything else that should be said on the subject?

MR. MARKS: No.

THE COURT: Will you have the agent come in?

MR. WEISSWASSER: Mr. Marks said something while I was reading and I got up to answer that. I am checking the pages I had not received before.

THE COURT: All right.

(Pause.)

MR. MARKS: For the record, a page in the report was missing from the copy that the FBI gave me. I have that page in front of me right now. It is page page 16A of the report. It consists of only four lines that I will read into the record. It is a continuation of a sentence on 16 which reads:

"The key marked with an asterisk was in the ignition of the tractor at the time of the recovery with the engine of the tractor in a running condition. The key was marked with an X and initialled RN. Photographs were taken of the tractor-trailer by Special Agent Gerald M. Collins."

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1 Now we have everything.

2 MR. WEISSWASSER: May I just copy that?

3 THE COURT: Anything else?

4 MR. WEISSWASSER: Yes. I have just read the
5 last two pages in part of 3500-5. The last page
6 consists of the following, an official FBI bureau
7 investigation report conducted by Agent Morrell of
8 one Frank Koerner. Now, this material was not turned
9 over to us except right at this moment. The Government
10 has been completely derelict in this. This is a
11 reported statement taken by the man who actually saw
12 the vehicle parked at the curb. The man who reported
13 seeing the vehicle parked at the curb and the
14 information was turned over to the FBI.

15 This statement indicates this man was present
16 at all times. The man saw an individual get in the
17 truck, drive it away, make the right turn on Grand
18 Avenue as testified to. He saw the vehicle pull up
19 to the curb. He was shown certain pictures and wasn't
20 able to identify anyone. One of which was my client.

21 We find this out in the middle of the trial.
22 I submit to your Honor that the Government cannot
23 proceed to conduct a case in this fashion. Whether
24 this material is exculpatory or not, had we been
25 furnished with the name prior to this we would have had

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1 an opportunity to interview this man and send
2 investigators out to talk to him and see what the
3 testimony might have been.
4

5 To find it out in the middle of the trial is --

6 MR. MARKS: Mr. Weisswasser makes a material
7 omission. The report reads:

8 "Koerner stated that he did not get a good look
9 at the driver of the tractor-trailer."

10 He is then shown a photographic spread and he
11 said, "I can't make him from the spread."

12 That is not Brady material. The man said he did
13 not get a good look at the driver.

14 (continued next page)
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1 MR. WEISSWASSER: That is the Government's
2 opinion as to whether or not this man would make a
3 witness or not. I think we should have been furnished
4 this material under Brady. We might have been able to
5 get a general description, whether he was fat, short,
6 tall, what he was wearing. I submit that the
7 Government knows full well this falls under Brady. The
8 Government is prejudging in this case what is
9 important to the defendant and what is not.

10 In the same fashion they prejudged which
11 grand jury material is important. The Government a
12 cannot usurp the function of the defense counsel. The
13 Government has a duty under Brady to turn over
14 everything which might conceivably be exculpatory or
15 defense material.

16 I submit to your Honor this is a clear violation
17 of Brady. The Government can't prejudge what may or
18 may not be turned over.

19 MR. MARKS: I can direct your Honor's attention
20 to page 23 and 24 of 3500-5.

21 (Pause.)

22 THE COURT: Well, I would have to say that I
23 do think the material would fall within the area of
24 Brady because of the fact he does say he was unable
25 to identify any of the individuals named.

2 1 My point is, as counsel points out, he wasn't
2 of course examined on on the reasons why he wasn't
3 able to make an identification. I know he was shown
4 photographs which may or may not indicate -- they may
5 have been face photographs -- with no indication of
6 the size of a person, whether he was large or small or
7 so forth. I don't know what to say. Let me ask you
8 this, what is it you want to do here?

9 MR. WEISSWASSER: Judge, before we continue with
10 this trial -- I am not moving for a mistrial -- but I
11 wouldask that this Court declare a recess. I would
12 like the address of the witness. I would like to send
13 an investigator over. I would like a continuance in
14 this matter. I was going to say until Thursday but
15 unfortunately Thursday is Thanksgiving. I am asking
16 until Friday.

17 THE COURT: Well --

18 MR. WEISSWASSER: Judge, I can't swear that this
19 witness is going to be called by the defendant --

20 THE COURT: I am not requiring you to swear to
21 that.

22 MR. MARKS: By the way, he is in no position to
23 be called in view of the fact he has just come out of
24 the hospital after having a lung removed.

25 He is not available to us except by way of

3 1 deposition and I am not sure he is in any condition --

2 MR. WEISSWASSER: That is the whole horror of
3 not receiving Brady material promptly. Witnesses
4 disappear and die. Here a man had a lung removed.

5 A month ago the case was pending -- what was the
6 date of the interview of this witness, your Honor?

7 THE COURT: According to this, 3/17/75.

8 MR. WEISSWASSER: This case is now pending a
9 year and nine months and we find out -- and year and
10 six months approximately -- and we find this out a
11 year and six months after he was driving a truck and
12 not having a lung removed.

13 MR. MARKS: But of course the significant thing,
14 I believe, is the fact that this man said "I didn't get
15 a good look at the defendant."

16 THE COURT: I understand, Mr. Marks, but again,
17 he was shown a photograph of the man that the
18 Government said did it and he was unable to identify
19 him.

20 On what is reported here, particularly since we
21 have a case where there is no question a truck was
22 hijacked, the whole question is one of identification.

23 As I see it, that is what the defense is all
24 about.

25 MR. MARKS: That is the way it is shaping up now.

THE COURT: It becomes clearer now.

MR. WEISSWASSER: He saw the movements of the vehicle. He obviously, or hopefully, may have seen the movements of the agent. He may corroborate Mr. Colgan's testimony or contradict Mr. Colgan's testimony, I don't know.

THE COURT: I must say I am in somewhat of a quandary at the moment.

MR. WEISSWASSER: I think in all fairness --

THE COURT: This -- it is your information that it would be futile to attempt to interview him at this juncture?

MR. MARKS: That is correct.

THE COURT: He is just out of the hospital you say?

MR. MARKS: Agent Morrell, do you know when he got out of the hospital?

AGENT MORRELL: The last time I talked to him, which was prior to this -- September, we were scheduled to come into Court in September. He was out of the hospital three weeks ago. I would say a month and a half or two months. He may be available to come in.

MR. MARKS: Why don't you go up and call Mr. Koerner and see if he is in any condition to come over here. If so, the FBI can make arrangements to have

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him come over.

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THE COURT: That will give you a chance to interview him.

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MR. WEISSWASSER: That would be lovely, yes.

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THE COURT: Thank you, Agent.

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AGENT MORRELL: Yes, your Honor.

7

THE COURT: Shall we go ahead?

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MR. WEISSWASSER: I have no objection to going ahead. If we finish with Mr. Colgan, I would like to reserve the right to recall him depending on what I learn from Mr. Koerner.

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MR. MARKS: Absolutely, I have no problems with that.

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MR. WEISSWASSER: I don't wish to waste time.

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THE COURT: All right, get the jury.

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MR. WEISSWASSER: Your Honor, look at page 23 which you read, our computation is not far wrong because this report says Mr. Koerner observed the truck at 9:30. That's what we come down to. We hit it right on the head taking the five-minutes leeway.

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(Continued next page.)

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(Out of hearing of the jury)

T 1 pm
R 1
MM/dw

MR. MARKS: Mr. Weisswasser just called Mr. Coerner and spoke to him. Apparently he's too sick to come into Brooklyn. My information, I get it from Agent Morrill, is that since Mr. Coerner got out of the hospital, he has not travelled more than five minutes away from his house.

Mr. Weisswasser has suggested one possibility and that is stipulating to his testimony. I don't think that is feasible. I think what would be feasible is taking his deposition on the telephone. Perhaps we can do that in chambers. He can be sworn and have a court reporter present and have a speaker phone.

MR. WEISSWASSER: I have no objection to that. I asked him if we could come to his home this morning to depose him and he advised me that he's taking pain killers and tranquilizers and everything else and he was uncomfortable talking on the telephone and by the time we get there this morning, he doesn't know whether he will be able to testify.

I suggested then that we try to make a tape recording of the conversation with him now with both myself and Mr. Marks, each of us on one extension and record the conversation and then work out a stipulation as to what his testimony would be. I have no

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objection to working out the situation as Mr. Marks has suggested if we have a speaker phone and I understand that your Honor has one in chambers.

THE COURT: No, I don't have one. The Federal Government is not that generous.

MR. WEISSWASSER: We had needed a phone with three extensions, one for Mr. Marks and one for myself. I don't know the legality of swearing a witness over the telephone, so that it would then become a deposition in true form and the only other problem, the problem that I visualize is that because of his medical condition, I think we are going to have trouble holding him to true legal conformity in the course of this conversation and to read that deposition to the jury might work a disservice to either one of us because he might say something in there that is not responsive or volunteer something that might be detrimental. That is why I say take a conversation and reduce it to the essential elements.

I have no objection to doing it the other way. I leave myself to the discretion of the Court what is proper. I did advise Mr. Marks that unless in some manner, shape or form we get his testimony in, because it is vital to my case, I would present to your Honor, what he told me and if we couldn't get his testimony in,

1 67 I would move to dismiss the indictment.

3 2 MR. MARKS: I am willing to accommodate
3 Mr. Weisswasser.

4 MR. WEISSWASSER: I realize that, but it is my
5 client whom I'm concerned with.

6 THE COURT: I don't believe that a deposition
7 by telephone under no circumstances seems feasible
8 to me. I really think a deposition in the sense of
9 having a reporter present who could administer an
10 oath and which the parties would agree, so that you
11 could have an opportunity to see the witness and also
12 I believe that the witness may want to have a nurse
13 or someone available because of the natural strain
14 on someone like that, in his condition, I realize
15 your questions would very likely be limited because
16 of his condition.

17 MR. WEISSWASSER: Absolutely. I don't intend
18 to strain the man physically. I am willing, even
19 though I thought this would be a short case, if we can
20 go on with the Government's case, you can do that
21 tomorrow, I will just have the jury come in on Friday
22 which is what I would expect we would be doing.

23 MR. MARKS: Perhaps we can go out to Lindenhurst
24 late this afternoon.

25 THE COURT: It is up to you, if you think this

68 is the best time.

MR. MARKS: Then we can continue tomorrow.

MR. WEISSWASSER: What I was going to suggest, your Honor, it is a little after 3:00, although my wife and family will have objections, I have a duty to my client. If we can accomplish it this afternoon I certainly will, but he said he's taking pain killers and tranquilizers.

If we told him we are coming out at a particular time tomorrow, hopefully he could arrange his medication schedule so that he's not in dire pain so that he will not be so severely medicated or tranquilized or pain killerized, if that is proper English, but he wouldn't be so full of medication that he would be of use to us.

THE COURT: I think it better in a way to do it under optimum conditions, when he would be better after a night's rest, tomorrow morning for example.

I don't know whether I should tell the jury not to come in until Friday. It is a dirty trick they would rather come in on tomorrow and be off on Friday. Is that feasible to it on Friday after Thanksgiving? I would suggest they have Friday off. So have them may be in a position to take Friday off. I will be here in any event, but I am trying to think whether it is better to take such witnesses as there are today,

69 and maybe even tomorrow and then tell the jury they're
off on Friday and then you can accomplish that on
Friday and we will go over until Monday.

MR. WEISSWASSER: I have no problem with that.

THE COURT: Does this pose any problem with
your trial schedule?

MR. MARKS: No, your Honor.

MR. WEISSWASSER: I have matters on, but if I
advise the other court that I am fully engaged the
same as we did last week, they will have no objection
to honor the engagement.

THE COURT: That might be a better thing to do,
unless as I say, I will leave it up to you. The only
thing I am thinking of it is a shame to tell the jury
they are going to have the day before Thanksgiving
off instead of the day after.

MR. WEISSWASSER: Would you want to poll the
jury or do you wish not to get into that?

THE COURT: My suspicion is that I couldn't
believe that they would choose tomorrow rather than
Friday.

MR. WEISSWASSER: Nor can I.

THE COURT: Rather than a three day holiday.
I couldn't see it otherwise.

MR. MARKS: I agree with that, how would you

1 70 find reasonable men rather than --

6 2 THE COURT: I would have to leave here at
3 4:30 because I am committed to go to two other judges
4 to a meeting in the Suffolk County Bar Association and
5 we are committed to be there this evening so we have
6 to go all the way to Syossett and drive to Centerport
7 where they are holding the meeting.

8 MR. WEISSWASSER: Who will bear the cost of
9 this, your Honor?

10 THE COURT: Well, I think in a way, certainly
11 the defense should bear some part of the cost. I don't
12 know how much is involved here. Actually, it is
13 primarily yourself, the Government will have to foot
14 the bill for -- are you talking about the taking of
15 the deposition?

16 MR. WEISSWASSER: Yes, a stenographer and the
17 transcribing. May I point out to the Court that had
18 the Government furnished us Brady material at the
19 appropriate time, we would not be in this posture today.

20 THE COURT: I understand, but you would have
21 had to do something like this to get his testimony.

22 MR. WEISSWASSER: We wouldn't have a man who
23 just had an operation where a lung was removed. We
24 would have had a fairly healthy human being available
25 to us at reasonable times and places who may have

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1 come into the office and we may have had to spend
2 money for an investigator to get him, but that is
3 speculation, but on telephone call he might have come
4 in to tell in the same fashion --

5 MR. MARKS: The Government is prepared to
6 split the cost with the defendant.

7 MR. WEISSWASSER: That is a generous offer.
8 But I have a defendant whatever the costs is going
9 to scrape around to pay them.

10 THE COURT: They won't be all that great. Will
11 they?

12 MR. MARKS: Why don't we do it that way,
13 subject to the further order of the Court.

14 MR. WEISSWASSER: That is very nice, but I have
15 a defendant who says that is so and it is not my
16 fault. It is not our fault to going out there to
17 depose this particular man. I am not asking the
18 Government to pay for my gas line.

19 What I'm talking about is the fee to the court
20 personnel, the transcription of this deposition and
21 putting it in form where it can be used. I don't think
22 that that cost should be a part of the defendant. We
23 will pay our own transportation --

24 THE COURT: I hate to get into a wrangle over
25 that now. I feel that regardless of what you may feel

72 was the Government delinquency here, I think that
fifty, fifty is a fair solution to the problem.

MR. WEISSWASSER: Have we any idea what those
costs will aggregate?

MR. MARKS: We will know pretty soon. The
court reporters are quick in getting out bills as they
are getting the copy out.

THE COURT: The major expense will be the
reporter and the transcription.

MR. WEISSWASSER: I don't think there are any
other expenses. That is what I am trying to find out.
Is there any court cost?

THE COURT: Positively. The cost of transporta-
tion. I don't know --

MR. WEISSWASSER: Might we inquire of Mr. Miele,
who is an expert in that field as to what his estimation
would be?

THE COURT: Well, let's get to the jury now and
we ill -- let's settle this later.

MR. WEISSWASSER: It is going to be settled
one way or the other. I know we have a jury waiting,
but I also have a defendant on trial.

THE COURT: I know, I have heard you say that
three times and I said that I thought under the
circumstances, a split was fair. If I'm wrong in that

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decision, if you wish to review the matter after it is done, I will hear you again on it. But for now, that is my view on it.

MR. WEISSWASSER: The only reason I say this is, once I tell the stenographer he will be paid, I don't want to have to take it out of my pocket.

THE COURT: Talk to him then.

MR. WEISSWASSER: I will have to talk to him first.

MR. MARKS: Mr. Miele, we are talking about something like a 50 page deposition, two and a half hours travel time, on the outside a couple of hours there.

(Off the record)

THE COURT: All right. Now, do we have another witness waiting, is that it?

MR. MARKS: I'm just going to put in a stipulation and then rest.

THE COURT: All right. Let me ask you this, are you ready to go ahead with some other witnesses tomorrow?

MR. WEISSWASSER: I'm ready to go ahead with some witnesses today.

THE COURT: Well, are you coming in tomorrow?

MR. WEISSWASSER: Yes.

(Out of hearing of the jury)

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MR. MARKS: I am happy to report that I think Mr. Weisswasser and I have entered into a stipulation with respect to Mr. Coerner's testimony.

MR. WEISSWASSER: We have it typewritten and we will ask the stenographer to read it at the proper time, so that I don't unduly place emphasis on any particular word. I think that would be appropriate.

I would like the record to be quite clear with the following matter, if your Honor please. We believe that this material is in the nature of Brady material and should have been turned over to the defendant sometime ago. The incident in question occurred on March 11, 1975, some 20 months prior to this date. The indictment, I believe, was in May or June of 1975. At that time, had the defense been made aware of Mr. Coerner and his statement made to the F.B.I. on March 12, 1975 --

THE COURT: The day after?

MR. WEISSWASSER: The day after, yes, and transcribed by the F.B.I.. It is on the 14th or 17th an official document which became part of their trial.

We first became aware of that when under the Court's direction, Mr. Marks, turned those records over to us. I don't in any way nor do I wish the record to indicate

1 my belief, that Mr. Marks did so surreptitiously or
2 in violation of Brady. I believe that he honestly and
3 sincerely felt that he could determine for the defendant
4 what was proper to be turned over and what was not. I
5 don't think he was deliberately hiding Brady material.

6 However, as your Honor and I agreed yesterday
7 when I made the application, that it is not for the
8 Government to decide what use the defendant can make and
9 what is properly exculpatory or not. If there is something
10 to be used by the defendant, it is the duty of the
11 Government to turn it over. I don't believe there is
12 any bad faith on the part of the Government in this
13 matter.

14 Had the defendant had the opportunity some 20
15 months ago or even 16 months ago, or even 12 months
16 ago to know of the existence of Mr. Coerner, we wouldn't
17 be faced with the fact that Mr. Coerner has had a lung
18 removed and is under medication, tranquilizers and the
19 such. And 20 months has elapsed and his memory has
20 faded since that time. The Government in the form of
21 Mr. Marks, has done everything it could to cure that
22 problem yesterday.

23 Mr. Marks offered to go out to Long Island to
24 depose him or do anything we possibly could. We worked
25 it out over the telephone and I don't think going out

1 to depose him would have served any more useful purpose
2 because obviously, the man gave us everything he
3 possibly could considering his condition and 20 months
4 having elapsed. I don't believe that 20 months later,
5 because of the circumstances as they exist today, that
6 this is curative of the defect. I'm taking it and
7 doing the best I can with it at this late date.

8 I urge on the Court, that that in no way cures
9 the problem here. There is no way to cure the problem
10 where -- when they let 20 months elapse and then an
11 unforeseeable event where the man had a lung removed
12 recently and is in no condition to be in a position to
13 concentrate on our problem as he is on his own problem.

14 The lung was removed due to cancer from what I
15 understand from Mr. Marks, who spoke to the F.B.I. and
16 talked to his wife and the man is not too long meant
17 for this world.

18 THE COURT: Is the original F.B.I. report going
19 to be made part of the record here, the 3500 --

20 MR. MARKS: We were just discussing that and I
21 would stipulate --

22 MR. WEISSWASSER: I would as well, but I point
23 out that the F.B.I. report, I have no objection to
24 that --

25 THE COURT: The reason I'm suggest it is this.

1 I understand the thrust of your motion or your renewed
2 motion, however, and I have not yet seen the stipulation.
3 I have a general recollection of what was said in the
4 F.B.I.'s contemporaneous report and the man's statement.
5 Perhaps I ought to read the stipulation that you say
6 has been entered into, the stipulation of fact and let
7 me before I rule on what I perceive your motion to be --
8 I will not deny you an opportunity to be heard. If I
9 see the stipulation and I will read the report again.

10 MR. MARKS: May we have this marked?

11 THE CLERK: Three page stipulation undated,
12 marked Defendant's Exhibit A.

13 MR. WEISSWASSER: I call your attention to 3500-5,
14 calling your attention to pages 23 and 24.

15 THE COURT: Have they been separately marked?

16 MR. WEISSWASSER: They have not.

17 THE COURT: Why don't you remove them and have
18 them marked separately?

19 I think there is some writing on the back of
20 one of those pages.

21 MR. WEISSWASSER: That is a map we drew, that is
22 not part of the exhibit.

23 THE CLERK: Two page document dated 3-17-75,
24 marked Defendant's Exhibit B, in evidence.

25 (So marked)

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MR. WEISSWASSER: After you have read those, I would like to give the basis for my argument this morning.

THE COURT: Who wants to speak first?

MR. WEISSWASSER: I made my argument, but I wanted you to read it and I want to say, your Honor will note the statement Mr. Coerner gave yesterday is much more specific in detail as the statement reported by the F.B.I..

THE COURT: I have read it.

MR. WEISSWASSER: The point I'm trying to make, 20 months ago I'm sure we might have been able, well his memory was much better and we would have been able to pinpoint in much more detail at that time.

THE COURT: I get your point.

MR. MARKS: Mr. Weisswasser has grossly misstated what he knows to be the case and that is, there has been no deterioration on the part of Mr. Coerner's memory. Mr. Weisswasser had a lengthy conversation with Mr. Coerner. I was not in the room, I didn't hear what they said. That was yesterday afternoon.

Yesterday evening, Mr. Weisswasser and I had a three-way conversation with Mr. Coerner. Following that, we drafted this detailed stipulation. After that,

1 we called Mr. Coerner again and read it to him line by
2 line and asked him to affirm or deny each allegation
3 in the stipulation. He did so with great clarity and
4 great specificity.

5 This trial was adjourned on a number of occasions
6 by reason of the fact that the Court's calendar was so
7 much that this case could not go to trial at an earlier
8 date. Mr. Coerner in no event would be available as a
9 live witness for this trial because of the fact he had
10 a cancer operation and he had a lung removed.

11 THE COURT: When did that occur?

12 MR. MARKS: I believe he got out of the
13 hospital a month and a half ago. I have told
14 Mr. Weisswasser and I repeat now, I am ready and willing
15 to go out to Lindenhurst at any time to depose
16 Mr. Coerner.

17 I have given Mr. Coerner no instructions about
18 not speaking to Mr. Weisswasser or the standard pitch
19 to the effect he has a right to talk to Mr. Weisswasser
20 or not. He has been completely candid with Mr. Weiss-
21 wasser in my judgment. Mr. Weisswasser could go out and
22 talk to Mr. Coerner alone or with me at any time.

23 Now, we drafted this stipulation on the basis
24 of these lengthy telephone conversations. It was clear
25 that Mr. Coerner's memory was very clear, his mind is

1 lucid. There is no indication that he was preoccupied
2 with his own problems that he couldn't concentrate on
3 the questions posed to him. He related in great detail
4 that day, the events of that day, and I submit the
5 defense has in no way been prejudiced by reason of the
6 Government's failure to turn over this material.

7 I submit the material was not turned over simply
8 because I didn't consider it to be Brady material in
9 view of the allegations of the report that Mr. Coerner
10 did not get a good look at the individual and conse-
11 quently, was not in a position to make any identifica-
12 tion. He saw him from three hundred feet away.

13 THE COURT: All right. I understand your
14 position and of course nothing you, Mr. Marks, I would
15 not ascribe any improper motives to you.

16 MR. MARKS: I appreciate that.

17 MR. WEISSWASSER: Nor do I, your Honor.

18 THE COURT: I know that. The problem is, it may
19 be to some extent the product of seeing this case
20 unfold that the critical issue in this case was the
21 identity of a person seen at that truck at or about
22 the time that Mr. Coerner first spotted the truck.
23 Granted that he did not get a good view of the person,
24 the stipulation does indicate that he's now able to
25 approximate the build of the person, but in any event,

1 what I'm call attention to is that a vital and critical
2 issue in this case, the issue in this case is, whether
3 or not this defendant was that man, as I see it.

4 And so to the extent that the Government had in
5 its possession a statement of the person who first saw
6 the truck as a result of the call and saw a person in
7 the vicinity, it is easy enought to say in hindsight
8 that that would have been vital to the defense, even
9 from the standpoint of making up its mind of whether
10 there should be a trial in this case, because upon
11 interviewing that witness, under those circumstances,
12 it might have been clear one way or the other. I don't
13 say it necessarily would have been, but it certainly --
14 this man was a vital witness to one side or the other
15 on the question of who was there.

16 As I understand, the parties agree the truck
17 was stolen, it contained stolen merchandise in inter-
18 state commerce in excess of the statutory minimum.
19 The whole question was whether this defendant was
20 implicated, as I see it, in the hijacking of that truck.

21 (Continued next page)
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24 133
MR. MARKS: I had no way that that was going

to be the issue until the first day of trial.

Prior to that, I assumed the defense would be the standard defense in hijacking cases, lack of knowledge.

I have never had a hijacking case where mistaken identity was an issue.

THE COURT: I will say this, and it puzzles me -- I believe the rule is amended -- where the Government is entitled to know of an alibi defense.

I don't know whether that subject was ever discussed.

MR. MARKS: It was never discussed.

THE COURT: It's something we all have to bear in mind.

MR. MARKS: The reason I never made an alibi request --

THE COURT: I believe that's the rule.

MR. WEISSWASSER: Upon request of the Government.

MR. MARKS: Yes, I think the Government must request notice of alibi. I never made such a request because it never occurred to me that they were going to contend the defendant was never there.

MR. WEISSWASSER: You must remember that this

2 1 defendant was arrested at the scene where the
2 investigation was, and until we got all the 3500
3 material, we couldn't correlate the times properly.

4 THE COURT: In a way, you are really saying
5 he wasn't there because he was really supposed to be
6 somewhere else, that is to say, he wasn't at the
7 scene of the original hijacking.

8 MR. WEISSWASSER: That's correct, but, of
9 course, we are not being charged with that.

10 THE COURT: Since I am thinking about my
11 proposed instructions to the Jury, this view of the
12 fact that it is conceded the goods were stolen, I
13 mean that the statutory --

14 MR. WEISSWASSER: We have no quarrel with that.

15 THE COURT: That all the elements of the crime
16 are really established except the identity.

17 MR. WEISSWASSER: Or possession.

18 MR. MARKS: Except there has not been a stip-
19 ulation in front of the Jury that this case, that
20 these were stolen goods.

21 THE COURT: I thought there was. I have a
22 distinct recollection of that.

23 MR. MARKS: No, I have a recollection of two
24 stipulations relating to the elements of the crime,
25 the first one is the goods were in interstate commerce.

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The second one was the value was in excess of \$100.

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To my knowledge, there is no stipulation to the

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effect that the goods were stolen. It's true that

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the whole thrust of the defendant's cross-examination

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and the defendant's opening suggestion that he is

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not really disputing that point --

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MR. WEISSWASSER: The Government has produced

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the witnesses to say they were stolen. I will con-

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cede they were stolen.

10

We never intended to contest that.

11

THE COURT: Perhaps I derived the wrong

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impression.

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MR. WEISSWASSER: We will concede that.

14

THE COURT: Despite stipulations, the Court

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has to charge the basic elements.

16

MR. WEISSWASSER: We will concede as a matter

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of law, these goods were taken and stolen without

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permission by whoever stole them.

19

THE COURT: You can say whatever you want in

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summation.

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For my purposes, to be sure I don't commit

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error in instructing the Jury, I have to instruct

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them on the elements of an offense.

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MR. WEISSWASSER: We will concede the Government

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has proven that element.

4 1 THE COURT: Usually I make a statement that
2 the parties have stipulated these facts.

3 However, since you are the sole judges of
4 the facts, if you find, you must find each element
5 beyond a reasonable doubt.

6 That's the way it goes. But actually this
7 case, to my way of thinking, could be made understand-
8 able to a Jury and has to be presented in its real
9 context, which is that there is no substantial dis-
10 pute about three of the four elements.

11 MR. WEISSWASSER: That's correct.

12 THE COURT: The only dispute is, was this
13 defendant -- you call it possession, but in my opinion
14 -- was this defendant the man who was in the truck in
15 Maspeth, in or near the truck in Maspeth -- I can't
16 say near, because I realize his position is he was
17 walking by when he was arrested.

18 MR. WEISSWASSER: That's correct.

19 THE COURT: Was this man really in the truck
20 and the man who drove the truck from where it was
21 parked to where it ended up?

22 MR. WEISSWASSER: Better yet, custody and
23 control, rather than possession.

24 MR. MARKS: If you charge the Jury to that
25 effect, the real issue is this the man driving the

5 1 truck in Maspeth.

2 There is no evidence who drove the truck from
3 27th Avenue to Maspeth.

4 THE COURT: No, I understand.

5 Was this the man who was driving the truck
6 in Maspeth?

7 There is the element of knowledge, obviously.

8 MR. WEISSWASSER: Of course.

9 THE COURT: You are not waiving that?

10 MR. WEISSWASSER: No.

11 MR. MARKS: Perhaps Mr. Weisswasser is waiving
12 that.

13 MR. WEISSWASSER: No, I wouldn't be fair to
14 a defendant in waiving there.

15 I think there are certain obligations on the
16 part of the Government that we don't have to help
17 them prove, and I think knowledge is one of them.

18 The other issues they have to prove, knowledge-
19 able possession and control, in order to satisfy,
20 I don't think they are two separate elements. They
21 are knowledgeable possession and control.

22 MR. MARKS: I Understand that Mr. Weisswasser
23 has to make a record on an appeal but I don't think
24 he is making a motion based on the fact that he made --

25 MR. WEISSWASSER: I thought I made it clear

6 1 yesterday.

2 At this point I move for a dismissal of this
3 indictment on the ground that the People have failed
4 according to Brady to supply the defendant with an
5 element which is now impossible to completely satisfy.

6 THE COURT: Well, I think, in deciding such a
7 question, the Court has to weigh the prejudice, if
8 any, which has resulted from what the Court is
9 satisfied was not a willful non-disclosure on the part
10 of the Government.

11 I think the basic question is whether, when
12 it turns out to be as important as the Court conceives
13 it to be, and the way the argument has been presented
14 and having a live witness, and I am not all together
15 satisfied by the Government saying that this case
16 should have come to trial at an earlier date, it would
17 have still been possible to be in touch with Koerner
18 and they would have known whether or not he was
19 going into a hospital and they could have made some
20 arrangement.

21 MR. WEISSWASSER: And possibly move this Court
22 for an earlier trial.

23 I attribute no bad motive on the part of
24 Mr. Marks. I point out that Mr. Marks was not the
25 assistant originally carrying this file. He recently

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1 inherited it.

2 MR. MARKS: I want to say one more thing,
3 and that is, if you bear with me, I will think a
4 little and I will -- well, in drafting the stipulation
5 yesterday, I allowed quite a number of damaging
6 statements, that is, statements damaging to the
7 Government's case to be in.

8 I believe on cross-examination of Mr. Koerner
9 on a deposition, I could have effectively -- the
10 impact of those statements, specifically the state-
11 ment that it is his recollection that this man was
12 of medium height and medium build.

13 On cross-examination, I think I could have
14 shown he has no way of knowing what kind of height or
15 build this man was because he never saw him, and I
16 could refresh his recollection with FBI report 302.

17 I could point out he couldn't see a man for
18 300 feet. I think the defense is better off now
19 than they would have been if they had Koerner as a live
20 witness.

21 THE COURT: I am taking in account having read
22 the proposed stipulation with respect to the Koerner
23 testimony and the original FBI report marked respective-
24 ly Defendant's Exhibits A and B for Identification,
25 and which I will direct to be made.

8 1 Well, the stipulation will certainly become
2 part of the record and I also direct that the FBI
3 report be made part of the record.

4 MR. MARKS: I have no objection.

5 THE COURT: And weighing, as I say, what I believe
6 I may be entitled to do, under the circumstances, what
7 the extent of the prejudice is, and recognizing that
8 it is not really possible to reconstruct what the
9 situation might have been if Koerner had been known to
10 the defense and had been interviewed and a decision
11 made with respect to whether or not it would have
12 been used, my judgment is that I believe this trial
13 should go forward and I will deny the motion for the
14 reasons I have stated.

15 MR. WEISSWASSER: I take exception to that.

16 THE COURT: Where do we go from here?

17 MR. WEISSWASSER: I have one more witness to
18 call. I'd like to recall the agent, Mr. Colgan.

19 We will read in the stipulation which we
20 have discussed and we will rest.

21 THE COURT: Today is the Federal Bar luncheon
22 and three of use are going there and we are going to
23 be leaving at a quarter to 12:00 and I won't get
24 back til perhaps 2:30.

25 Does that pose any problem?

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MR. WEISSWASSER: No, your Honor.

Does your Honor anticipate that we will sum
and charge

THE COURT: I would assume so if the case is
finished by that time, unless you have a rebuttal case
in mind.

MR. MARKS: I don't have one at the moment
and I don't know whether I will put one on. Although
I think it is doubtful.

THE COURT: I think we better get started.

S fls.

(Continued on next page.)

79 (First witness for the defense)

D O R O T H Y W E A N, called as a witness having been
first duly sworn by the Clerk of the Court, testified
as follows:

DIRECT EXAMINATION

BY MR. WEISSWASSER:

Q Mrs. Wean, what is your relationship to the
defendant, Raymond Wean?

A I am his wife.

Q For how many years were you married?

A Eight years.

Q When were you divorced?

A In 1963.

Q Have you any children from that marriage?

A Yes.

Q How many?

A Two.

Q What are their ages presently?

A My son is ten and my daughter is 13.

Q Calling your attention to the morning of
March 11, 1975, do you remember that date?

A Yes, I do.

Q Did you have occasion to speak to your ex-husband,
the defendant Raymond Wean on that date?

A Yes.

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D. Wean-direct

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Q Tell us the circumstances of that conversation.

A I had called him about a little after 9 o'clock in the morning. I was having trouble with my son in school and I had called him to ask his assistance to help me with my boy. He was boisterous in school.

Q Where did you call him to come to help you?

A At his home.

Q At your son's home?

A No, my ex-husband's home.

Q Where did you ask Ray to come?

A To my home in Maspeth.

Q What address?

A 6014 55th Drive.

Q In Maspeth?

A Yes.

Q And what did you husband tell you he was going to do?

A That he would be over shortly.

Q And did your husband arrive at your home that morning?

A No, he did not.

Q Did have anything further to do with your ex-husband that day at all?

A No.

81

D. Wean-direct

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Q Did you do anything when he had not arrived?

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A I had called his home.

4

Q At approximately what time was that?

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A Approximately a little after 11:00.

6

Q With whom did you speak?

7

A I spoke to his present wife.

8

Q What did you say to her?

9

A I asked her where he had been and she said

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that he had left quite a while ago and should be at the house

11

by now, which he had not arrived.

12

Q And did you see your husband at all on that day?

13

A No.

14

MR. WEISSWASSER: I have no further questions.

15

CROSS-EXAMINATION

16

BY MR. MARKS:

17

Q Now, you told us your address, Mrs. Wean?

18

A Yes.

19

Q What is your phone number?

20

A 894-2545.

21

Q How long have you had that phone number?

22

A I really don't remember, but for quite a while.

23

Q Have you ever had any other phone numbers?

24

A Yes, I did, one more besides that.

25

Q Do you recall that one?

82

D. Wean-cross-Marks

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2 A No, I'm sorry, I don't.
3 Q Is it 545-8517?
4 A No.
5 Q Did you keep a diary?
6 A Do I keep a diary?
7 Q Yes.
8 A No.
9 Q Do you keep some sort of a calendar with
10 appointments and what you have done on a given day?
11 A Sometimes.
12 Q On March 11, 1975, did you keep such a
13 calendar?
14 A No, not that I know of.
15 Q Now, you say that your son was boisterous in
16 school; is that correct?
17 A Yes.
18 Q Was that the first time that he was boisterous
19 in school?
20 A No.
21 Q Was it the last time he was boisterous in school?
22 A No, by no means.
23 Q Now, was that some kind of an anniversary?
24 A Yes.
25 Q What anniversary was that?

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D. Wean-cross-Marks

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A My anniversary.

Q You weren't married to your husband, were you,
at that time?

A No.

Q And when you say your anniversary, you're talking
about your anniversary with Mr. Wean?

A It would have been mine and his.

Q But since you had been divorced you didn't
celebrate your anniversary?

A No.

Q As matter of fact, how many years had passed
from the time you were married until 1975?

A I think seven years.

Q So, is it fair to say that when you were married
an anniversary might have been an important even to you; is
that correct?

A Yes.

Q But after seven years it became less important,
is that fiar to say?

A Yes.

Q Did anything unusual happen on that day?

A On that particular day?

Q On March 11, 1975?

A Well, I was having difficulty with my son.

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D. Wean-cross-Marks

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Q You said that wasn't unusual?

A Not an everyday affair, but he gave me trouble
in school.

Q That happened from time to time?

A But for that week previous to that it had been
happening.

Q Now, did any -- forgive me for asking this, but
did anybody, was there a death in your family on March 11,
1975?

A No.

Q Was that your son's birthday?

A No.

Q Was it the birthday of any close member of your
family?

A No.

Q And as you said, nothing unusual happened on
that day except for the fact this was one of those days on
which your son was boisterous; is that correct?

A Yes, he was previous to that.

Q Nevertheless, you say you can remember the
events of March 11, 1975; is that correct?

A Yes.

Q Very clearly?

A As clear as I can, yes.

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7 2 Q Addressing yourself to March 10, 1975, about
3 what time did you get up in the morning?

4 A I usually arise at 7 o'clock in the morning.

5 Q Specifically on March 10, 1975, the day before
6 you had this conversation at 9 o'clock, what time did you get
7 up in the morning?

8 A Same time I always do, at 7 o'clock in the
9 morning.

10 Q Are you sure you didn't get up a little earlier?

11 A I don't remember. It was a long while ago.

12 Q It was a long time ago?

13 A Yes.

14 Q Do you recall, were you working at that time?

15 A No.

16 Q So you didn't work on March 10th?

17 A No.

18 Q Can you tell us how you spent March 10th?

19 A Usually do my chores, children going to school.

20 Q Specifically, what did you do on March 10th is
21 what I want to know?

22 A I don't remember.

23 Q How about March 12th, what did you do on that
24 day?

25 A I don't really remember. I do my chores, that

86

D. Wean-cross-Marks

is all what I usually do everyday in the week.

Q And March 11th was like any other day?

A Yes.

Q Did you see Joe Messino on that day?

A No.

Q Are you sure of that?

A I didn't see him.

Q When is the last time you saw Joe Messino?

MR. WEISSWASSER: I object, if your Honor please.

THE COURT: Well, I will sustain the objection.

No foundation.

Q Are you sure -- you remember very clearly that it was exactly at 9 o'clock that you talked to your husband on March 11th; is that correct?

A No, it wasn't exactly. I don't know the exact time I called him, it was a little after 9:00.

Q How much is a little after?

A Between ten after and quarter after, I presume.

Q So it could have been 9:30?

A I don't know. I had gotten back from taking my children to school and that is when I called him up because that is when the teacher told me he was a problem.

Q You didn't make any note this happened on March 11th, these events you just testified to?

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A No, I had no reason to.

Q When was it you learned you were going to testify at this trial, the first time?

A I don't really know. It was a while ago.

Q Getting back to something I raised a moment ago, and that was about your anniversary. Because -- did you maintain a close relationship with your husband over those years, say 1975?

A I don't know what you mean by close relationship.

Q How often would you see him?

A When he would come to see my children.

Q And that is all?

A Yes, that was periodically.

Q Did you see him with some friends?

A No.

Q You stopped seeing him and his friends; is that correct?

A Oh, yes.

Q When you were married you often saw his friends, isn't that correct?

A Whenever they came to the house.

Q Is it fair to say that his friends, that you were friendly with his friends in many cases?

A I didn't see too many of his friends.

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Q There were some friends of his who were also friends of yours?

A They were acquaintances.

Q Is it fair -- withdrawn.

Did you like some of his friends?

MR. WEISSWASSER: I object.

THE COURT: Sustained. Immaterial.

Q On March 11, 1975, -- withdrawn.

You say that you called, you called your former husband's house?

A Yes.

Q What number did you call him at?

A I think it is 746-5092.

Q You say you think. You're not sure?

A I don't call him that often. Only unless it is necessary for my children.

Q And since you have been divorced, have you had occasion to call him at any other number?

A Not that I know of, no. That is the only number.

Q Where does he live?

A In Whitestone, as far as I know.

Q Can you tell us who, apart from your husband, you talked to on March 11, 1975?

A On the phone, do you mean, I'm sorry?

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D. Wean-cross-Marks

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Q First on the phone and in person?

A On the phone, probably my mother and my sister.

Q I'm not interested in probably. Do you have a specific recollection of having talked to your mother on that very day?

A No.

Q Do you have any specific recollection of having talked to your sister on that very day?

A Particularly, no.

Q Do you have any specific recollection of having talked to anyone on that very day?

A In person or on the phone?

Q Let's first talk about in person.

A In person, well, I see people in the street all the time.

Q You recall, do you recall seeing anybody specifically on that day?

A No, I don't.

Q Do you recall specifically, talking to anybody else on the phone on that particular day?

A No, I don't.

MR. Marks: I have no further questions.

(Continued next page)

T2PMR2
SS:KG

D. Wean-redirect-weisswasser

REDIRECT EXAMINATION

BY MR. WEISSWASSER:

Q Mrs. Wean, so the record is clear, you say you have no recollection of talking to anyone on that particular date. Does that include Katherine Wean? Does that include Raymond Wean?

A I talked to both of them.

Q You have a clear recollection of talking to both of them that day?

A On the phone, yes.

Q When did you learn for the first time that your ex-husband, Raymond Wean had been arrested on that day?

A The day after.

Q How did that come about?

A He had called me to tell me he had gotten into trouble.

MR. MARKS: Objection.

MR. WEISSWASSER: It's not being offered for the truth of the statement contained therein. It's being offered for the utterance, how she learned.

MR. MARKS: I would like to know what the utterance is.

THE COURT: You'll hear it if you withdraw the objection.

2 1 D. Wean-redirect

2 MR. MARKS: I would like to hear it at sidebar.

3 (sidebar)

4 MR. MARKS: Could we have an offer of proof on
5 this?

6 MR. WEISSWASSER: Just the fact that he was
7 arrested, that she could not be able to recollect
8 certain things happened. I'm about to offer proof
9 as to why she remembered certain things --

10 THE COURT: I'll overrule the objection.

11 (open court)

12 Q You may answer that question.

13 THE COURT: Perhaps the reporter should read
14 it back.

15 (question read back)

16 Q Continue with your answer?

17 A I'm sorry, I don't remember what the question
18 was.

19 Q The question was, what did he tell you over
20 the telephone?

21 A That he had gotten into trouble.

22 Q On the day before?

23 A Yes, the day before.

24 Q Did he make any references to why he didn't
25 get over to your house the day before?

3

1 D. Wean-redirect

2 A That's the only reason he told me because he
3 had gotten into trouble.

4 Q Did there come a time when you had a further
5 conversation with your husband with regard to his being in
6 trouble and what took place with you on March 11?

7 MR. MARKES: Objection. I think we better have
8 another offer of proof on this.

9 MR. WEISSWASSER: Same offer, Judge.

10 THE COURT: I'll overrule the objection.

11 THE WITNESS: Please rephrase that; I don't
12 understand you.

13 Q Did there come a time shortly thereafter when
14 you had a further conversation with your husband as to what
15 took place on March 11, 1975, the day he was arrested?

16 A Oh, to speak about what had happened, you mean.

17 Q Yes.

18 A Yes, sir.

19 Q And what did your husband tell you in terms
20 of what happened on March 11, 1975 --withdrawn.

21 Let me rephrase that.

22 What did your husband say to you or what was the
23 conversation between you and your husband about your recol-
24 lection of what happened on March 11, 1975?

25 MR. MARKS: Objection.

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1 THE COURT: I'll sustain that.

2 MR. WEISSWASSER: Might I come up and make an
3 offer on that, Judge?
4

5 THE COURT: Are we talking aobut a subsequent
6 conversation between --

7 MR. WEISSWASSER: Might I come up? It might
8 be best.

9 THE COURT: My point is we have the day after
10 she learned something. Is ther a subsequent --

11 MR. WEISSWASSER: Yes.

12 THE COURT: Ask her that question.

13 MR. WEISSWASSER: I'm talking aobut the sub-
14 sequent conversation.

15 THE COURT: Ask her if she did, ask her again.

16 Q Do you recall having another conversation with
17 your husband in regard to the events of March 11, 1975?

18 A Yes.

19 Q How long after March 11, 1975 was that?

20 A I think it was a day or two after that.

21 Q What was the substance of that conversation?

22 MR. MARKS: Objection, hearsay.

23 MR. WEISSWASSER: It is not again --

24 THE COURT: No, it is not hearsay. Besides,
25 it's not being offered, as you said before for the

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1 D. Wean-redirect

2 truth, but for the utterance.

3 I'll overrule the objection and the jury will
4 be instructed on that. Go ahead.

5 Q What was the substance of that conversation?

6 A The leading up to how he had gotten into
7 trouble, what happened when he was on his way over to my
8 house.

9 Q Did he say anything to you about the possibility
10 of your becoming a witness in the case?

11 A Yes.

12 Q And what did he tell you to do, if anything
13 in that regard?

14 A Really nothing, just that he was supposed to
15 be at my house. That's why he was coming over.

16 Q Was there a further conversation in regard
17 to the possibility of your testifying?

18 A Yes.

19 Q And what was that conversation as best you can
20 remember?

21 A I don't really -- I don't understand what you
22 mean by the conversation.

23 Q Well, other than telling you you might be a
24 witness in the case -- you told us that already?

25 A Yes.

6 1 D. Wean-redirect

2 Q Did he tell you to do anything in preparation
3 to be a witness?

4 A No.

5 MR. MARKS: I'm going to object again, your
6 Honor. This is going far beyond the purpose for this
7 is purportedly being offered, which is simply to
8 establish her remembrance of the events.

9 THE COURT: I do think that that is going beyond
10 the last question.

11 I will sustain the Government's objection to
12 that last portion, instruct the jury to disregard
13 that.

14 Q Mrs. Wean, is it a fair statement to make al-
15 though you may not remember what happened on March 10, your
16 husband wasn't arrested on -- your ex-husband was not arrested
17 on March 10, to your knowledge, was he?

18 A No.

19 Q He wasn't due at your house on March 10, was
20 he?

21 A No.

22 Q Although you don't remember what happened on
23 March 12, your husband wasn't due to your house on March 12?

24 A No.

25 Q To your knowledge he was not arrested on

March 12?

A No, not that I know of.

Q Is it a fair statement to make that you are
testifying not as to the exact date of March 11, but the
date you found out your husband was arrested --

MR. MARKS: Objection, leading.

THE COURT: Well, it is. It is leading.

MR. WEISSWASSER: I'll withdraw it.

THE COURT: I'll sustain the objection.

Q Are you testifying to the events that happened
on March 11, 1975 or the events that happened on the day
your husband --

MR. MARKS: Same objection.

THE COURT: I'm not sure I understand the
question.

MR. WEISSWASSER: I'm asking her is her memory
geared to a particular date or to a particular series
of events.

In other words, -- I'll withdraw it and phrase
it another way.

Q Mrs. Wean, are you sure it was March 11, 1975
that your husband was arrested?

A Yes.

Q How do you fix that date?

D. Wean-redirect

A The only way I can fix it, it happens to be my anniversary.

MR. WEISSWASSER: I have no other questions.

RE CROSS-EXAMINATION

BY MR. MARKS:

Q Mrs. Wean, where were you married?

A Where was I married?

Q Yes.

A Christ Lutheran Church.

Q Where is that?

A Astoria.

Q When was that?

A March 11, 1962.

Q This wasn't the first time your husband was arrested, was it --

MR. WEISSWASSER: I object if your Honor please and I ask for a sidebar.

THE COURT: Yes.

(sidebar)

MR. WEISSWASSER: If your Honor please at this time the defendant most respectfully moves for a mistrial.

THE COURT: It didn't open open the door, no. There is a problem here. I'm wondering whether it's

D. Wean- recross-

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possible to erase this from the jury's mind.

First of all, an arrest is meaningless, as you understand.

MR. MARKS: I understand.

THE COURT: Meaningless in the sense it wouldn't be admissible as evidence of anything concerning his record or anything of that sort.

MR. MARKS: All I'm trying to do is establish the fact that he was arrested, many many times and accordingly there's nothing very special of March 11.

THE COURT: That would be totally impermissible and would certainly seal the fate of this trial if you persisted in that.

I don't know what to say to you. It's extremely prejudicial to this defendant, in the real sense I'm talking about. It's of no advantage here at all.

MR. MARKS: It is to the extent that Mr. Weisswasser had her testify that she remembered these events because she remembered them by virtue --

THE COURT: Anniversary date.

MR. MARKS: By reason of the fact that her husband was arrested on that date.

THE COURT: That's a coincidence of event, arrested on the date of his anniversary.

D. Wean-recross

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MR. WEISSWASSER: And the tenth and the twelfth those are the only two days I included.

THE COURT: It's extremely troubling.

MR. WEISSWASSER: I'm very loath to make this motion but I must press it. I hate to waste the time and effort No one wants to go through with the trial faster than I have to.

THE COURT: I'm going to deny the motion for a mistrial, but I caution you, do not bring it up again.

I'm going to instruct the jury to disregard that.

MR. WEISSWASSER: Might my exception be noted.

THE COURT: Yes.

(open court)

THE COURT: Members of the jury, I'm going to instruct you to erase from your minds the last question by Government counsel. People are arrested for many things. Some of them quite inconsequentially and many times, with no foundation, as we all know.

It is not something that you should allow to remain in your minds in connection with your consideration on the evidence in this case. I'm trying to impress on you as firmly as I can.

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2 MR. WEISSWASSER: I ask your Honor make one
3 further statement to the jury. I suppose I should
4 make the request sidebar.

5 (sidebar)

6 MR. WEISSWASSER: That is that the mere fact
7 the question was asked is not evidence that he was
8 arrested.

9 THE COURT: Yes.

10 (open court)

11 THE COURT: Also, it goes without saying that
12 the mere fact that the defendant was asked, is no
13 evidence that he was in fact arrested.

14 Bear that in mind.

15 RE CROSS EXAMINATION

16 BY MR. MARKS:

17 Q Mrs. Wean, could you please relate the events
18 of March 11, 1976 to us?

19 A March 11, 1976?

20 Q Yes, this year?

21 A I'm sorry, but I can't remember.

22 Q How about March 11, 1974?

23 A No.

24 Q March 11, 1973, you remember that date?

25 A No.

D. Wean-recross

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MR. MARKS: I have no further questions.

THE COURT: You may step down.

THE WITNESS: Thank you.

(witness excused)

MR. WEISSWASSER: If your Honor will excuse
me I'll get the next witness.

(continued on next page)